IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
JULY 17, 2008 Session

CHRISTOPHER DALE COATS v. JULIA ALLISON COATS

Appeal from the Chancery Court for Rutherford County
No. 05-1485DR J. Mark Rogers, Judge

No. M2007-01219-COA-R3-CV - Filed October 8, 2008

This is a divorce case. Wife/Appellant appeals the trial court's (1) failure to include certain funds from a family partnership in Husband/Appellee's gross income for purposes of child support, (2) deviation from the parties' proposed parenting plan in scheduling visitation, (3) granting Husband/Appellee a credit against his child support arrears for private school tuition, laptop computer, and orthodontia, and (4) denying Wife/Appellant's request for her attorney's fees. We affirm in part, reverse in part, and remand to the trial court for further proceedings.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Reversed in Part

J. STEVEN STAFFORD, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Thomas F. Bloom, Nashville, TN, for Appellant

Shawn P. Sirgo, Nashville, TN, for Appellee

OPINION

Appellant Julia Alison Coats and Appellee Christopher Dale Coats were married in 1984. Both parties graduated from the Nashville School of Law and are attorneys licensed to practice in the State of Tennessee. Although Ms. Coats never practiced law on a full-time basis, during the first eight years of the marriage, she did work outside the home. When the parties' only child C.C. was born in 1993, the parties decided that Ms. Coats would stay at home.

On March 1, 2004, Ms. Coats filed a complaint for divorce. In December 2004, Ms. Coats dismissed her complaint. Near the end of December 2004, Ms. Coats and C.C. moved from the marital residence. Thereafter, the parties agreed to abide by the visitation arrangement that had been presented to the parties by C.C.'s counselor, Tony Rankin.

In May 2005, the parties entered into mediation with Ed Bailey, an attorney and elder at their church. On October 5, 2005, the parties signed a handwritten arbitration agreement in the presence of Mr. Bailey. By this agreement, the parties were to submit the divorce and parenting issues to binding arbitration with a panel of three to four elders from their church. The first arbitration meeting was scheduled for November 8, 2005.

Unbeknownst to Mr. Bailey or Ms. Coates, on October 13, 2005, Mr. Coats filed a complaint for divorce against Ms. Coats. On November 8, 2005, the parties signed a written arbitration agreement referencing the October 5, 2005 agreement to stay all divorce proceedings. Following the execution of the arbitration agreement, the parties participated in the arbitration process. Despite the agreement to stay the divorce proceedings in the chancery court, on May 11, 2006, Mr. Coats filed a motion requesting a *pendente lite* hearing on temporary child support, custody and visitation. The matter was referred to the Special Master for findings and recommendations regarding temporary custody and support. Ms. Coats contested this hearing before the Special Master on the ground that the parties had entered into a binding arbitration agreement. Mr. Coats countered Ms. Coats assertion, alleging that the parties had mutually agreed to discontinue arbitration. By agreed order of July 7, 2008, the parties agreed not to be bound by the terms of the November 8, 2005 arbitration agreement, and scheduled a *pendente lite* hearing on issues of alimony, child support, custody and visitation. The parties further agreed that they would immediately contact Dr. William Bernet, who would conduct a psychological evaluation of each party and render an expert opinion as to the appropriate residential schedule and child custody placement.

By order of August 18, 2006, the trial court adopted the Master's Report, which states, in relevant part:

> 2. That [Mr. Coats] shall have visitation...every Friday from 4:30 p.m. ... until the following Monday morning at 7:30 a.m. ....
>
> 3. That the parties shall alternate all holidays....
>
> 4. That [Mr. Coats] shall have visitation...during the child's two-day fall vacation in 2006.
>
> 5. That [Mr. Coats] shall have visitation...for a period of one week during the summer 2006....
>
> * * *
>
> 7. That [Ms. Coats] shall have visitation... during the entire Thanksgiving holidays in 2006.
>
> 8. That the parties shall split the Christmas Holiday during 2006....

* * *

> 10. That [Ms. Coats] is underemployed. Accordingly, the sum of $1,200 shall be added to her gross monthly income for calculating Mr. Coats' child support obligation.
>
> 11. Beginning July 3, 2006 [Mr. Coats] shall pay...$985.00 in child support *pendente lite*....[1]

The Master recommended no *pendente lite* spousal support, and set the trial date for November 2, 2006.

In August 2006, Mr. Coats moved the court to re-evaluate his child support obligation asserting that his income had decreased by $20,000 per year due to the fact that he had not been re-elected to his judgeship, and that his actual visitation with C.C. was 101 days per year. Based upon the attached worksheet, Mr. Coats requested a decrease in child support to $794 per month. Ms. Coats opposed the change in Mr. Coats' child support obligation, alleging that the Mr. Coats' proposed worksheet failed to include $1,817.83 per month in income from his family partnership. Ms. Coats also asserted that Mr. Coats had not exercised visitation over the 75 days recommended by the Master. Based upon the attached worksheet, Ms. Coats requested an increase in Mr. Coats' child support obligation to $1,049 per month. In addition, Ms. Coats moved the court to re-calculate her monthly gross income. In support of her position, she asserted that, since the *pendente lite* hearing, she had begun paying her parents $1,200 per month in rent, plus paying child care expenses. Ms. Coats asked for a decrease in her monthly gross income from $3,800 to $2,600.

The complaint for divorce and all pending motions were heard over five days.[2] On March 13, 2007, the trial court granted the divorce on grounds of inappropriate marital conduct. Concerning visitation with the minor child and child support, the court ruled, in relevant part, as follows:

> (H) The Court in regards to the William M. Coats Family Limited Partnership finds that it is not a marital asset, but that, in fact, that is a separate asset. It was created by Mr. Coats' father for the benefit of Mr. Coats and his three siblings and mother....
>
> The Court heard testimony in reference to an issue regarding Mr. Coats receiving a distribution from the William M. Coats Family Limited Partnership in the past years... and Mr. Coats has an eighteen

---

[1] Prior to this child visitation schedule, the parties had abided by the schedule arrived at through mediation and arbitration.

[2] November 2nd, 20th, and 27th of November 2006, and January 8th and 12th of 2007.

percent (18%) interest in that, with the current value...of approximately $200,000.00 to $250,000.00. Furthermore, it was confirmed that [Mr. Coats] could not have access to that, but that, in fact, was still controlled by his father as to when any distributions could or would be made....

The Court heard testimony in reference to an issue regarding Mr. Coats receiving distribution from the William M. Coats Family Limited Partnership in the past years. The evidence was presented and the Court accepts that [the] distribution was for tax purposes only. It was not distribution where the income was paid and he used that for either himself or his wife or his child or a combination thereof. Rather, it was a pass-through payment and that money was used to pay the tax consequences that arose from other distributions which had been made by the father...to the Family Limited Partnership, or earnings of the Family Limited Partnership, which, basically, just increased its value, but caused tax consequences to those who had an interest therein. The Court finds that would not be considered as an income for purposes of child support computation in any way, and the Court accepts that testimony....

* * *

9. The Court finds in regard to retroactive child support that it is appropriate that the Wife be awarded child support retroactive to the date of the parties' separation in December, 2004 until the temporary hearing before [the Special Master] in July of 2006.... The retroactive child support is going to be based on standard visitation, which is eighty (80) days for the Father and the remainder for the Mother. The Court finds it is appropriate to use the current income of the Mother which is $31,200.00 and the Father's earnings from TennCare and State of Tennessee employee as a judge during the period of time he was on the bench of $20,000.00 a year. No income is to be imputed from the family limited partnership.

For purposes of computing retroactive child support, Mr. Coats will be given credit for the $12,000.00 a year during the school year he paid in tuition for the child to attend [private school]. What the Court understood he said was he paid the school tuition at [] $1,000 per month. It goes by the months from the date of December 2004 when Mrs. Coats left the marital residence until the final hearing. He will be given credit for the braces...[as] the Court finds those to be necessary for the child.... [H]e would be given credit for

> $4,400.00 for the braces. Furthermore, he would be given credit for the purchase of a $2,500.00 laptop computer....
>
> 10. For purposes of computing current child support the Court will use [Mr. Coats'] current income....
>
> 11. The parties have made a decision to educate their child through private school...and Mrs. Coats has indicated she does not have the financial wherewithal to do that. Both parties agree that the minor child can go to [private school] but that the Court orders that it would be at Father's expense for tuition, books, school uniform and school related trips.... He will continue to pay for the remainder of this school year...as support because the child is already enrolled in school. That is the word they use, above and beyond child support as an extraordinary expense[].... The Court is not going to order Mr. Coats to pay for private school beyond this school year.... If Mr. Coats is willing to voluntarily pay the private school tuition, he may do so and the child will attend [private school]. Mr. Coats must notify Mrs. Coats in writing... each year whether... he will be sending the child to [private school].... The Father has made the choice of education to send the minor child at his expense to [private school] or if he chooses not to send him to [private school] the minor child will attend the public school in the Mother's school district as to where she lives.

The Court denied Ms. Coats' request for attorney's fees. The Permanent Parenting Plan arrived at by the Court names Ms. Coats as the primary residential parent, and gives her 210 days per year with C.C.; Mr. Coats is given 155 days with C.C. Concerning summer vacations, the parenting plan states:

> The day-to-day schedule shall apply accept as follows: Both parents shall have a period of two weeks uninterrupted visitation with the minor child. For purposes of Summer visitation, a week shall be defined as follows: from Friday at 6:00 p.m. to fourteen days later at 6:00 p.m. The Mother shall have the minor child during the last two weeks of June every year. The Father shall have the minor child during the last two weeks of July every year.

In the parenting plan, the trial court also reiterates the private school tuition ruling, to wit:

> Both parties agree that the minor child can go to [private school] but that the Court orders that it would be at the Father's expense for tuition, books, school uniform and school related trips.... He will

> continue to pay for the remainder of this school year... as support because the child is already enrolled in school. This is above and beyond the child support as an extraordinary expense[]....

Furthermore, the parenting plan sets Mr. Coats' monthly gross income at $5,834.70. Ms. Coats' monthly gross income is set at $2,600.00. Based upon these numbers and the child support worksheet attached to the order as an exhibit, the trial court set child support as follows:

> 1. The final child support order is as follows:
>
> > a. The Father shall pay to the other parent as regular child support the sum of **$474.00** Monthly....
>
> 2. Retroactive Support: The Court awards back child support in the amount of $15,246.00 to __X__ Mother... dating from December 1, 2004 - July 1, 2006**.**
>
> Father is given credit towards arrearages for back child support in the amount of $24,900.00 for the minor child's private school tuition... at a rate of $1,000.00 per month from December 1, 2004 - July 1, 2006, the costs of the braces for the minor child in the amount of $4,400.00, and a laptop computer for the minor child in the amount of $2,500.00. Therefore, this amount offsets any back child support owed and leaves a surplus credit to Father of $9,654.00.

On April 11, 2007, Ms. Coats filed a motion to alter or amend the final decree of divorce. The trial court denied Ms. Coats' request to alter or amend the decree as to matters concerning child support, and visitation. She appeals and raises six issues for review as stated in her brief:

> I. Whether the trial court erred in failing to enforce the Father's agreement to the proposed visitation schedule when the father repeatedly and consistently affirmed that agreement in sworn testimony during trial court but changed his mind during rebuttal evidence.
>
> II. Alternatively, whether the Chancellor abused his discretion in granting the Father more visitation than previously agreed upon where (1) the Mother was the child's primary, custodian during the parties' eighteen month separation, (2) the Mother had been the primary, if not exclusive, caregiver for the minor child since his birth, (3) the Father exhibits serious lapses in judgment adversely effecting the well-being of the minor child, and (4) the Father submitted no historical evidence of his comparative fitness as a parent.

III. Whether the trial court erred in giving the Father credit against his retroactive child support obligation for his payment, from marital funds, of private school tuition, a computer, and braces for the minor child with the result that all retroactive child support was forgiven and the Father received a credit against future payments of child support.

IV. Whether the Chancellor erred in (1) not including the Father's income of $10,000 from the family partnership as income for purposes of calculating child support and (2) not including the appreciation of the father's interest in the family partnership for purposes of calculating child support.

V. Whether the trial court abused its discretion in fashioning the summer vacation schedule whereby the Mother will NEVER be able to exercise her full two weeks of uninterrupted summer visitation with her child.

VI. Whether the Chancellor abused [his] discretion in failing to award the Mother reasonable attorney fees.[3]

Because this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. ***See*** Tenn. R. App. P. 13(d). Furthermore, when the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has had the opportunity to observe the witnesses and their manner and demeanor while testifying is in a far better position than this Court to decide those issues. ***See McCaleb v. Saturn Corp***., 910 S.W.2d 412, 415 (Tenn.1995); ***Whitaker v. Whitaker***, 957 S.W.2d 834, 837 (Tenn. Ct. App.1997). The weight, faith, and credit to be given to any witness' testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court. ***See id.***; ***see also Walton v. Young***, 950 S.W.2d 956, 959 (Tenn.1997).

Visitation Schedule

In July 2006, the parties waived mediation and agreed to submit the issues of child custody and visitation to Dr. William Bernet. Thereafter, Dr. Bernet interviewed the parties and the child, conducted psychological testing, and consulted with the family's counselors and mental health practitioners. Based upon his evaluation, Dr. Bernet compiled a report with recommendations, which were incorporated into the proposed parenting plan submitted to the court. In relevant part, Dr. Bernet recommended that Ms. Coats would have primary, residential custody, and that Mr. Coats would have "residential custody of the child every other weekend from Friday after school until

[3] We note that Ms. Coat's attorney in the appeal did not represent her at the trial level.

Monday morning when school began, every Tuesday evening from the end of school until 8:00 p.m., a two week summer vacation, and alternating holidays for a total of one hundred and two (102) days." The parties operated under this agreement prior to the final hearing. Following that hearing, the trial court deviated from the *pendente lite* visitation and custody schedule by granting Mr. Coats one additional evening and night per week beginning on Thursday evening from the end of school until Friday morning.

On appeal, Ms. Coats contends that this ruling was in error. Specifically, she asserts that she and Mr. Coats had agreed to continue under the visitation and custody plan arrived at by Dr. Bernet. However, at the hearing, Mr. Coats testified that there was some disagreement regarding the parenting plan, to wit:

> THE COURT: What I would like for you to do is this, what are the issues I need to decide.
>
> * * *
>
> MR. WARD [attorney for Mr. Coats]: Well, on the parenting plan, it's [sic] just a few issues, Your Honor. The issue is that we want to be able–Mr. Coats wants to be able to meet halfway point on the exchange of the child. Understanding the way the visitation is set up is that he has the child every other weekend from the time school lets out and then takes the child Monday to school.... [H]e wants to be able to just meet at a halfway point, whatever that may be.
>
> * * *
>
> Your Honor, the other issue is that the phone calls are an issue. And what happened is the expert put some language in there that, I recommend this as far as phone calls. All we simply want to do is follow the expert's recommendations as he set forth. And he set forth that when the child the child's with Mr. Coats, she'd have one call over the weekend, or two calls per week when he has extended visitation. And the same in reverse and that's all we're wanting to limit it to.
>
> MR. HOLLINS [attorney for Ms. Coats]: Was that not in [the proposed parenting plan]? Your Honor, that's fine with me, whatever. I thought I did it like he–if I didn't–
>
> THE COURT: Y'all agree on phone calls, that's not an issue.
>
> MR. WARD: Excellent.

> THE COURT: What's the next issue?
>
> MR. WARD: The other issue is that in the parenting plan he put that the child attends...private school. It's 12,000 a year, plus books, [etc.], which brings the price on up higher. All we're saying is that we want to be a pro rata share. I think that's what the child support guidelines state....
>
> And, Your Honor...there's one other issue in the parenting plan where it states that Mr. Coats is to notify Ms. Coats any time he takes the child outside of a county that connects with Davidson County. The expert didn't recommend that, and I think that's way too restrictive...[b]ecause it's just applying to [Mr. Coats] not [Ms. Coats]. So, therefore, we're not agreeing with that.

At the end of Mr. Coats' direct examination, the trial court asked:

> Here's what I understand you both to say: You agree on a visitation schedule; is that correct?

Mr. Coats' attorney answered "Yes" to this question. Based upon this answer, Ms. Coats asserts that she was under the impression that the visitation and custody arrangement was uncontested and that the only issues involving the parenting schedule were (1) the location for transfer, (2) the notification issue for travel outside contiguous counties, and (3) the passport issue. Consequently, she asserts that she did not attempt to bring her expert (on custody and visitation) to testify at the hearing. After Ms. Coats had closed her proof, Mr. Coats was recalled to the stand and testified, in relevant part, as follows:

> Q [to Mr. Coats by his attorney]: Okay. And your–how is that [temporary] visitation [plan] working out with you and your son?
>
> A. It–it works out great. I mean [C.C.] enjoys it. I enjoy it. We can sit and talk. We discuss different things.
>
> Q. Does [C.C.] tell you that he enjoys the time with you.
>
> A. Yes, he did.
>
> Q. Is [C.C.] happy when he's with you?
>
> A. Yes, sir, he is.

Q. I mean, does he act like he doesn't love you or like you or enjoy being with you?

A. No, he does not. He–we have a good time together.

Q. And if you look back on that every other weekend that you've had since the temporary hearing till [sic] now, what's–what is–what's wrong with this picture?

MR. HOLLINS [attorney for Ms. Coats]: Your Honor, I'm going to object. I mean, it calls for speculation "what's wrong with this picture?"

* * *

THE COURT: I'll sustain his objection and let you rephrase the question.

Q. (By Mr. Ward) Mr. Coats, what is it that you want that you're not getting?

A. I'd like to have some more time with my son, because it's an opportunity for him. It's an opportunity for me. He's growing. I mean, in four years, he's going to be going to college. I want–I want him to know me. I want to know him.

We sit and talk. We laugh. I love that little boy. I truly–I love that little boy more than anything else in my life. And to be able to just sit and talk with him, it's just–that's heaven on earth.

* * *

THE COURT: All right. Mr. Coats, when you say, "I want more time with my son," I mean, are you asking to change what you've already asked for, which I understand to be every other weekend and I think one afternoon in the week? And, Mr. Ward, you help me out on that. I'm–I don't know. Is he changing something here or is he saying–

MR. WARD: Your Honor, that's what he's telling you.... He says..."[f]rom the time that has started till [sic] the time this has ended, I've seen my son every other weekend, Christmas and stuff like that, and that's not enough." He's saying, "I want more time."

THE COURT: What's your time you're requesting that you started out–have you changed it something–some way?

MR. WARD: We haven't–[Mr. Coats has] changed what...he wants.

THE COURT: From the time he testified before?

MR. WARD: Yes, sir.

THE COURT: Well...I don't know what that means: "I just want more time" ....

Hold on a minute. Ms. Coats is sitting here. I mean, I want her lawyer to know what you're asking for, because I can't just get something–I can't just read minds–

MR. WARD: I understand.... Well, is it–all right.

CONTINUED DIRECT EXAMINATION BY MR. WARD:

Q. Mr. Coats, I mean, right now you're getting every other weekend, and I think there's one evening each week.

A. I'm not getting that evening.

Q. You're not getting an evening each week? Okay. So what do you want–tell the Court what you want as far as time with your son, so he'll know.

A. Dr. Bernet had said that I could have him every other weekend plus one day, and that was–that was regular. That was normal. That was what he said I–we went and met with him, and I told him, no, that's–that's–that's wrong. I've got to have–I'd like–I want to see my son more.

Q. Mr. Coats, the Court wants to know what you want.

A. I would like to have half the amount of time.

THE WITNESS: Your Honor, I'll take anything. You know, I'd take all–every–just the weekend. I'll take the weekends. If you want to give me just the week, I'll take the week. If you want to give me half, I would–I would really–I want that. It is–it would be good for [C.C.].

> It would be good for me. [C.C.] loves me. [C.C.] loves his mother. I don't want [C.C.] to be in the middle. And I'm going to ask for 50 percent of the time. I put that before the Court, and it's–and I don't envy the Court's job.
>
> MR. WARD: All right. Thank you.
>
> THE COURT: Anything else, counsel?
>
> MR. HOLLINS [attorney for Ms. Coats]: No, Your Honor.

Ms. Coats asserts that Mr. Coats' disagreement with the proposed parenting plan constituted a trial by ambush, and that the trial court should not have allowed Mr. Coats to renege on his previous agreement to abide by the temporary parenting plan. During this entire line of questioning, Ms. Coats' attorney failed to lodge any objection. Tenn. R. Evid. 103 states, in relevant part, that:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection if the specific ground was not apparent from the context....

Moreover, Tenn. R. App. P. 36 provides, in relevant part::

> Rule 36. Relief; Effect of Error. —(a) Relief To Be Granted; Relief Available. —The Supreme Court, Court of Appeals, and Court of Criminal Appeals shall grant the relief on the law and facts to which the party is entitled or the proceeding otherwise requires and may grant any relief, including the giving of any judgment and making of any order; provided, however, relief may not be granted in contravention of the province of the trier of fact. Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.

The Advisory Commission Comment to this section of Rule 36 states:

> This subdivision makes clear that the appellate courts are empowered to grant whatever relief an appellate proceeding requires.... The last sentence of this rule is a statement of the accepted principle that a

> party is not entitled to relief if the party invited error, waived an error, or failed to take whatever steps were reasonably available to cure an error. This subdivision also makes clear that an appellate court should not grant relief if in so doing it would contravene the province of the trier of fact.

Ms. Coats did not object to Mr. Coats' statements that he wanted more time with C.C. until her motion to alter or amend. Consequently, we are without authority to grant her any relief based upon the theory that Mr. Coats' testimony constitutes trial by ambush, or upon her contention that she did not have the opportunity to present expert testimony concerning the parenting schedule. In fact, as set out in the portion from the hearing above, the trial court gives Ms. Coats' attorney the opportunity to object by asking "anything else counsel?" In response, Ms. Coats' attorney simply states "[n]o, Your Honor." Because Ms. Coats has not preserved this issue with a timely and specific objection in the record, she cannot be heard to complain on appeal. That being said, our inquiry does not end here. We must now address the question of whether the final parenting plan arrived at by the trial court is reasonable and in the best interest of the child.

It is well settled that, in matters of support, child custody, visitation and related issues, trial courts are given broad discretion; consequently, appellate courts are reluctant to second-guess a trial court's determinations regarding these important domestic matters. Tenn. Code Ann. § 36-6-101(a)(1) (2005); ***Parker v. Parker***, 986 S.W.2d 557, 563 (Tenn.1999); ***Hoalcraft v. Smithson***, 19 S.W.3d 822, 827 (Tenn. Ct. App.1999). As explained in Richards on Tennessee Family Law:

> It is not the function of appellate courts to tweak a visitation order in the hopes of achieving a more reasonable result than the trial court. Appellate courts correct errors. When no error in the trial court's ruling is evident from the record, the trial court's ruling must stand. This maxim has special significance in cases reviewed under the abuse of discretion standard. The abuse of discretion standard recognizes that the trial court is in a better position than the appellate court to make certain judgments. The abuse of discretion standard does not require a trial court to render an ideal order, even in matters involving visitation, to withstand reversal. Reversal should not result simply because the appellate court found a "better" resolution.

Janet L. Richards, Richards on Tennessee Family Law § 9-2 (2d ed. 2004) (quoting ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001)). In making its decision regarding entry of a permanent parenting plan, the trial court should consider the factors set out at Tenn. Code Ann. § 36-6-404(b) (2005). Among those factors are:

> (1) The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society that the child faces as an adult;

> (2) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting responsibilities relating to the daily needs of the child;
>
> (3) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interests of the child;
>
> * * *
>
> (5) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;
>
> (6) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;
>
> (7) The love, affection, and emotional ties existing between each parent and the child;
>
> (8) The emotional needs and developmental level of the child;
>
> * * *
>
> (11) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
>
> * * *
>
> (15) Each parent's employment schedule, and the court may make accommodations consistent with those schedules;

Tenn. Code Ann. § 36-6-404(b).

In this case, the temporary parenting plan granted Mr. Coats visitation with C.C. every other weekend from Friday after school until Monday morning, Tuesday evenings from the end of school until 8:00 p.m., alternating holidays, and two uninterrupted weeks of summer vacation. In its final parenting plan, the trial court keeps the foregoing schedule, but grants Mr. Coats additional visitation every Thursday from the end of school until Friday morning. Ms. Coats argues that the award of additional days was error. We have determined that Ms. Coats did not properly preserve her objection to the "rebuttal" evidence proffered by Mr. Coats. Because there was no objection, the trial

court correctly considered this testimony in reaching its decision to grant Mr. Coats additional time with C.C. Turning to the additional evidence in the record, it is clear that both of these parties love their child. Both have a desire to bond with C.C., and a willingness to provide for the child and to nurture and parent him. At the time of the hearing, C.C. was fourteen years old. Although Ms. Coats asserts that C.C. does not get along with his father, this evidence is disputed in the record. Mr. Coats testified that he and his son have a good relationship, and that Mr. Coats only desires to strengthen his bond with C.C. As stated above, questions of fact are given a presumption of correctness, and questions of credibility are deferred to the trial court as it is in a better position to judge the truthfulness of each witness. We have reviewed the entire record in this case, and we cannot conclude that the trial court's granting Mr. Coats an extra day per week with his son was error. In fact, from the totality of the circumstances, it seems to be in C.C.'s best interest for him to spend as much time as possible with both of his parents.

Concerning the summer vacation schedule, the trial court awarded each party two weeks of "uniterrupted vacation" with C.C. each summer. Ms. Coats was awarded the last two weeks of June; Mr. Coats was awarded the last two weeks of July. Ms. Coats asserts that, under this arrangement, she will "never have an uninterrupted fourteen (14) day summer vacation with her son." Specifically, Ms. Coats contends that either Father's Day, or the alternating Fourth of July (both of these holidays are awarded to Mr. Coats) will interrupt the fourteen day period." Again, this alleged error in the visitation schedule was not raised by Ms. Coats at the hearing and, in fact, was first raised in the motion to alter or amend. Having failed to lodge a timely and specific objection at the trial level, Ms. Coats cannot be heard to complain on appeal. However, even if we assume, *arguendo*, that Ms. Coats preserved her objection, from the record before us, we conclude that the evidence does not preponderate against the trial court's determination regarding the child's summer vacation.

Although the parties may have agreed to a definite visitation schedule, a trial court is not bound by the parties' agreement to follow the recommendations of a third party in matters of child custody. ***See, e.g., Smith v. Smith***, 220 S.W.2d 627, 630 (Tenn. 1949). The trial court had broad discretion to modify that plan in light of the evidence adduced at the hearing, and the best interest of C.C. From the evidence in record, and in light of the statutory factors set out above, we conclude that the trial court did not abuse its discretion in fashioning a visitation schedule that was slightly different from the proposed plan.

Ms. Coats also takes issue with the trial court's alleged failure to enforce certain other provisions of the proposed parenting plan. Specifically, Ms. Coats argues that the trial court erred in: (1) failing to include language in its plan, which would keep Mr. Coats from having C.C. around Mr. Coats' father (the child's paternal grandfather), (2) failing to guarantee that C.C. would continue with his therapist, (3) relieving Mr. Coats from partial responsibility for uncovered medical expenses for the child, and (4) depriving Ms. Coats of the authority to make major decisions regarding C.C.'s education. We will address each of these assignments of error in turn.

Concerning Mr. Coats' father, the proposed parenting plan provides: "[s]ince it is unpleasant and uncomfortable for [C.C.] to stay at his paternal grandfather's house, the father shall not make arrangements to live with his father...." At the hearing, counsel for Mr. Coats conceded that Mr. Coats agreed with this statement in the parenting plan; however, in its final parenting plan, the trial court did not include the language. The record in this case does not substantiate Ms. Coats' contention that C.C.'s best interests would be served by limiting his time with Mr. Coats' father. Consequently, the trial court's omission of this language from its plan does not constitute an abuse of discretion. That being said, Mr. Coats did agree not to live with his father. Based upon the lack of evidence to clearly establish that the grandfather is not a good influence on C.C., and in light of the fact that Mr. Coats agreed not to live with his father, we cannot conclude that the exclusion of the disputed language from the permanent parenting plan was error.

Concerning C.C.'s therapy, in the proposed parenting plan, the parties state that Dr. Bernet has recommended that C.C. continue with his therapist, Dr. Jeremy Shapiro. However, Dr. Shapiro, is not covered by the plan under which C.C. is insured. At the hearing, Mr. Coats stated that it would be fair for the trial court to make a *pro rata* division of C.C.'s uncovered medical expenses between the parties. On appeal, Ms. Coats asserts that the trial court did not enforce Mr. Coats' agreement to be responsible for a *pro rata* share of the child's uncovered medical expenses. However, upon review of the final decree of divorce, we find that the trial court did order the parties to pay a *pro rata* share of the child's uncovered medical expenses, to wit: "[u]ncovered reasonable and necessary medical expenses, which may include...counseling will be paid by pro rata in accordance with the [parties'] incomes." Although we concede that, in its statements from the bench, the trial court noted that, "[i]f [Ms. Coats] thinks the child needs to go to counseling...and that's a covered medical expense...the cost [should] be divided accordingly," a trial court speaks through its orders; here, the order states that each party shall be responsible for his or her *pro rata* share of the child's uncovered medical expenses. Consequently, this issue is moot.

Education Decisions

Ms. Coats asserts that the trial court gave Mr. Coats the sole decision-making authority concerning the child's education, we disagree. In the parenting plan, the trial court states that educational decisions will be "Joint." In explanation of this ruling, the court reiterates that both parties have agreed that the child will attend private school. It is undisputed that Mr. Coats is to bear the entire financial responsibility for the private school expenses. Because private education expenses are extraordinary expenses, which cannot be charged as basic child support,[4] the trial court left the decision of whether the child would continue to attend private school to Mr. Coats, who would bear the financial burden thereof. However, this ruling does not give Mr. Coats unilateral decision-making regarding the child's education. While Mr. Coats may choose not to continue paying the extraordinary expense of private education, any decision regarding alternate education would be jointly made by the parties under the order as it stands.

[4] Tenn. Comp. R. & Reg. 1240-2-4-.03(b)(5).

Retroactive Child Support

The trial court awarded retroactive support from the date of the parties' separation, in December 2004, until the *pendente lite* order of July 2006. The total amount of retroactive child support was $15,246.00. However, Mr. Coats was given a $24,900.00 credit against his arrearage (which resulted in a credit of $9,654.00 to Mr. Coats). The credit includes $1,000 per month "for the minor child's private school tuition," $4,400.00 for the child's braces, and $2,500 for the child's laptop computer.

On appeal, Ms. Coats first asserts that the trial court's order of retroactive child support was incorrect because the court based this award on standard parenting time (80 days with Mr. Coats). In making its decision to base the award of retroactive support on standard visitation, the trial court stated from the bench that:

> [T]he fact of the matter is, the mother had the child with her and there was no objection to that, at least through the court proceedings, and it appears to be at the best standard visitation, and so what I'll do for you so you-all don't have to–you two Counsel do not have to argue with your clients over it, you use what standard visitation time is, and I think it's pretty–Mr. Ward [attorney for Mr. Coats], Mr. Hollins [attorney for Ms. Coats], you-all both understand what that means, don't you? The dates–if you don't, tell me now.
>
> MR. HOLLINS: I understand, Your Honor. It's 80 days?
>
> THE COURT: Yes, that's right, 80 for the husband and the difference for the wife, Mr. Ward, do you understand that?
>
> MR. WARD: I do.
>
> THE COURT: I've got to come up with something, and the best I can say is that from what they basically had, every other weekend, and what not, but rather than have everybody argue what they actually did, I'm finding it's to be based on standard visitation.

Based upon our reading of the transcript, there seems to be an evidentiary problem in determining the exact visitation schedule followed from the date of separation until the *pendente lite* order. Because neither party came forward with evidence from which the trial court could determine the exact parenting schedule, the court proposed using the standard visitation of 80 days. Again, counsel for Ms. Coats lodged no objection to the trial court's statement that it will use 80 days in setting retroactive support. In the absence of a timely and specific objection, she cannot be heard to complain on appeal. Moreover, the evidence that is contained in the record concerning the actual schedule does not preponderate against the trial court's decision to use 80 days in determining

retroactive support. Consequently, we cannot conclude that the trial court's use of standard shared parenting time was error in this case. We now turn to the question of whether the trial court erred in granting credit against Mr. Coats' arrearage for private school tuition, braces and a computer.

Parents may be given credit against their child support obligation for voluntary payments they have made on behalf of their children when the payment is for necessaries which are not being supplied by the custodial parent. ***See, e.g., Peychek v. Rutherford***, No. W2003-01805-COA-R3-JV, 2004 WL 1269313, at *3 (Tenn. Ct. App. June 8, 2004) (no perm. app. filed). However, the credit for necessaries cannot exceed the amount of support due for the period during which the necessaries were furnished. Garrett, Tennessee Divorce, Alimony and Child Custody, with forms, § 14:8(8) (2004). The obligation to provide necessaries requires the provision of appropriate food, shelter, tuition, medical care, legal services, and funeral expenses as are needed. What items are appropriate and needed depends on the parent's ability to provide and this issue is to be determined by the trier of fact. ***Id***. at § 2:3(3). Therefore, we review these finding *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. Tenn. R. App. P. 13(d).

Tenn. Comp. R. & Reg. 1240-2-4-.03(b)(5) defines "expenses associated with...private elementary and secondary schooling" as "extraordinary education expenses," and excludes these payments from the basic child support schedule. In short, by its definition, private school tuition payments are not necessaries; consequently, in order to give credit against an obligor parent's basic child support obligation, the trial court must explain its deviation. Here, the trial court made no such finding. Consequently, we conclude that it was error for the trial court to grant Mr. Coats credit against his child support obligation for the payment of private school expenses. Likewise, the laptop computer that Mr. Coats provided to C.C. is not a necessary child-rearing expense. Therefore, the trial court erred in allowing a credit against Mr. Coats' arrears for same.

The trial court determined that C.C.'s orthodontia was a necessary expense for which Mr. Coats was given credit against his arrears. We have reviewed the record and conclude that this finding is supported by the record. Consequently, the trial court did not err in allowing credit for C.C.'s braces against Mr. Coats arrearage.

Mr. Coats Income

Ms. Coats next asserts that the trial court erred in not including Mr. Coats' interest in his family partnership in his income for purposes of calculating child support. It is undisputed that Mr. Coats has an 18% interest in the William M. Coats Family Limited Partnership. On his 2005 income tax return, Mr. Coats reported $21,814 in income from partnerships. The Tennessee Child Support Guidelines define gross income (for child support purposes), in relevant part, as follows:

> Gross income of each parent shall be determined in the process of setting the presumptive child support order and shall include all income from any source (before deductions for taxes and other

> deductions such as credits for other qualified children), whether earned or unearned....

Tenn. Comp. R. & Reg. 1240-2-4-.04(a).

Interest income, dividends, and trust income are all specifically included in the definition of gross income. ***See*** Tenn. Comp. R. & Reg. 1240-2-4-.04(a)(ix)-(xi).

In reaching its decision to exclude Mr. Coats' interest in the family partnership from his gross income for computation of child support, the trial court reasoned that any distribution Mr. Coats received from the partnership was "merely for tax purposes," and "was not a distribution where the income was paid and he used that for either himself or his wife or his child or a combination thereof." The record reveals that Mr. Coats did not actually receive this income; it simply increased his basis in the family partnership. However, the question still remains as to whether this undistributed income can be included in Mr. Coats' gross income for purposes of computing child support.

Tennessee law recognizes that earnings of an S-Corporation do not constitute income for child support purposes unless the retained earnings are excessive or the sole shareholder is manipulating his or her income. ***See, e.g., Taylor v. Frezell***, 158 S.W.3d 352 (Tenn. 2005). However, in cases where the obligor parent is a sole proprietor, retained earnings may be considered in determining that parent's child support obligation. ***See Sandusky v. Sandusky,*** No. 01A01-9808-CH-00416, 1999 WL 734531 (Tenn. Ct. App. Sept. 22, 1999); ***Mitts v. Mitts***, 39 S.W.3d 142 (Tenn. Ct. App. 2000). Mr. Coats is neither a sole proprietor, nor a shareholder in an S-Corporation. Rather, he is a partner in a family-owned limited partnership. Under the above authority, we conclude that Mr. Coats' undistributed earning from the family partnership would be income to Mr. Coats for child support purposes if the retained earnings are excessive, or have been used to manipulate Mr. Coats' income. However, if the retained funds are reasonable for the continued operation of the family partnership, then Mr. Coats' gross income should not include these funds. Because there is not enough evidence in the record from which to make this determination, we remand for further proceedings as to the nature of these undistributed funds.

Concerning the $10,000 that Mr. Coats actually received from the family trust, the trial court's conclusion that this was merely a pass-through of funds to satisfy taxes may have been correct, but this determination does not, *ipso facto*, exclude these funds from Mr. Coats' gross income for purposes of child support. Under the definition of gross income, any monies actually received by Mr. Coats from the partnership, no matter if they were used to satisfy a tax obligation, constitutes income for purposes of child support. Tenn. Comp. R. & Reg. 1240-2-4-.04(a)(1). We conclude, therefore, that the trial court erred in not including the $10,000 distribution in Mr. Coats' gross income.

Attorney's Fees

Ms. Coats requested the court to award her attorney's fees of approximately $50,000, which the court declined to do. An award of attorney's fees in a divorce case constitutes alimony *in solido*. ***See Herrera v. Herrera***, 944 S.W.2d 379, 390 (Tenn. Ct. App.1996). Tenn. Code Ann. § 36-5-121(d)(5) (2005) provides: "Alimony in solido may be awarded in lieu of or in addition to any other alimony award, in order to provide support, including attorney fees, where appropriate." This Court reviews alimony decisions under an abuse of discretion standard. ***Garfinkel v. Garfinkel***, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996). As with any award of alimony, a trial court should consider the relevant factors set forth in Tenn. Code Ann. § 36-5-121(i), with the most important factors being the need of the economically disadvantaged spouse and the obligor spouse's ability to pay. ***Riggs v. Riggs***, 250 S.W.3d 453, 457 (Tenn. Ct. App. 2007).[5] As this Court explained in ***Koja v. Koja***:

> [Awards of attorneys' fees as alimony *in solido*] are appropriate, however, only when the spouse seeking them lacks sufficient funds to pay his or her own legal fees...or would be required to deplete his or her resources in order to pay these expenses. Where one party has been awarded additional funds for maintenance and support and such funds are intended to provide the party with a source of future

---

[5] The statutory factors, under Tenn. Code Ann. § 36-5-121(i), include:

> (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
> (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
> (3) The duration of the marriage;
> (4) The age and mental condition of each party;
> (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
> (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
> (7) The separate assets of each party, both real and personal, tangible and intangible;
> (8) The provisions made with regard to the marital property;
> (9) The standard of living of the parties established during the marriage;
> (10) The extent to which each party has made such tangible and intangible contributions o the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party
> (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
> (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

> income, the party need not be required to pay legal expenses by using assets that will provide for future income.

Koja v. Koja, 42 S.W.3d 94, 98 (Tenn. Ct. App.2000) (internal citations omitted).

We have reviewed the entire record in this case. The proof shows that Ms. Coats is a licensed attorney, but that she has chosen to remain unemployed during the pendency of these proceedings. The trial court made a specific finding that Ms. Coats was voluntarily underemployed. Furthermore, the trial court's division of marital property supports its determination that Ms. Coats had sufficient funds from which to pay her own attorney's fees. From the totality of the circumstances, we cannot conclude that the trial court erred in declining to award Ms. Coats her attorney's fees as alimony *in solido*.

Mr. Coats has asked for his attorney's fees in defending this appeal, asserting that it is frivolous. The remedy for a frivolous appeal is provided in Tenn. Code Ann. § 27-1-122, which states:

> [w]hen it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on judgment and expenses incurred by the appellee as a result of the appeal.

This statute "must be interpreted and applied strictly so as not to discourage legitimate appeals ..." ***Davis v. Gulf Ins. Group***, 546 S.W.2d 583 at 586 (Tenn.1997). From the record, we do not conclude that the present appeal is frivolous. We deny Mr. Coats' request for attorney fees.

For the foregoing reasons, we reverse the trial court's order as to retroactive child support, and as to Mr. Coats' income for purposes of calculating his support obligation. We remand this matter for such further proceedings as may be necessary consistent with this opinion, including determination of the nature of the undistributed funds from Mr. Coats' family partnership, and whether same should be included in his gross income, inclusion of the $10,000 distribution from the partnership in Mr. Coats' gross income, and removal of the credit against Mr. Coats' child support arrearage for private school tuition and laptop. We affirm the decision of the trial court in all other respects. Costs of this appeal are assessed one-half to the Appellant, Julia Alison Coats and her surety, and one-half to the Appellee, Christopher Dale Coats, for which execution may issue if necessary.

_____

J. STEVEN STAFFORD, J.